

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-213320

DATE: December 27, 1983

MATTER OF: H. L. Martz Construction Corporation

DIGEST:

Although the agency erroneously recorded \$400,000 as the amount available to fund a construction contract, the agency in fact had determined prior to bid opening that only \$357,149 was actually available. Award to the bidder who, although not low for the base bid and all additives, was low for the base and two additives which was the most the agency could purchase with the funds actually available, was proper.

H. L. Martz Construction Corporation protests the award of a contract to Mechaneer, Inc. under invitation for bids (IFB) No. DACA31-83-B-0242 issued by the United States Army Corps of Engineers for the construction of two pre-engineered metal buildings. In addition to the base bid for the two buildings, the IFB contained five additive items, of which Item 1 was listed as part of the base bid. Martz complains that although it was the low bidder for the base bid and all five additives within the funds available for the procurement, the Corps improperly awarded the contract to Mechaneer. We deny the protest.

The IFB contained the "Additive or Deductive Items" clause prescribed in Defense Acquisition Regulation § 7-2003.28 (DAC No. 76-26, December 15, 1980) which provides:

"The low bidder for purposes of award shall be the conforming responsible bidder offering the low aggregate amount for the first or base bid item, plus or minus (in the order of priority listed in the schedule) those additive or deductive items providing the most features of the work within the funds determined by the Government to be available before bids are opened.. . ."

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B-213320

Concurrently with the issuance of the IFB on September 9, 1983, the Corps indicated on Department of the Army (DA) Form 2544, "Intra-Army Order for Reimbursable Services," the total amount of funds that would be transferred to the procuring activity for the project. These funds included \$357,149 for contract costs, and \$46,432 for contingencies and supervision and administration (S&A) costs. The record shows that these amounts were not correctly totaled and recorded on DA Form 2544--the correct addition of the two figures noted above is \$403,581, not \$400,000 as recorded on the form. The amount of \$400,000 is also recorded on DA Form 2496, dated September 27, 1983, the document by which the contracting officer, in accordance with Engineer Contract Instruction 1180-1-1 § 2-201(f), made a written determination for the contract file prior to bid opening of the funds available for the project. As the Corps admits, the figure of \$400,000 was recorded in error, in that section 2-201(f) provides:

" . . . The amount of funds to be recorded as available should be computed by deducting normal contingencies, government costs for supervision and administration and approved 'other direct' costs from the program amount."

No such deduction for those non-contract costs was made in this instance.

This error, however, was not noticed before the September 28 bid opening. Of seven bids received, those of Martz and Mechaneer were first and second low as follows:

	Base Bid (Including Additive 1)	Additive 2	Additive 3	Additive 4	Additive 5
Martz	\$338,576	\$17,250	\$7,800	\$7,500	\$11,960
Mechaneer	327,234	19,358	7,160	23,248	6,310

Thus, Martz' total bid for the base and all additives was \$383,086; Mechaneer's total bid was \$383,310.

On the same date, the contracting officer informed Martz that its bid, including the base and all additives, was low and within the amount of funds (erroneously assumed to be

\$400,000) available for the contract. Almost immediately thereafter, the Corps' Chief of Engineering and Construction noticed the error on DA Form 2496, and informed the contracting officer that only approximately \$355,000 was available for processing the award, and that the remaining approximate amount of \$45,000 was allocated to cover contingencies and S&A costs. (The more precise figures are \$357,149 and \$46,432, respectively.) Therefore, in view of the actual contract amount available, the contracting officer determined that the Corps could make award on only the base bid (including Additive 1) and Additives 2 and 3. Martz' bid on that basis, however, was not low at \$363,626, compared to Mechaneer's at \$353,752. Accordingly, the Corps awarded the contract for the base (including Additive 1) and Additives 2 and 3 to Mechaneer on September 30.

Martz protests that the award to Mechaneer was improper because the terms of the "Additive and Deductive Items" clause of the IFB required that the low bidder be determined on the basis of the funds available for the project prior to bid opening. Essentially, Martz argues that the figure of \$400,000 as recorded on DA Form 2496 constituted the Corps' written determination to that effect which could not be altered after bid opening, even if subsequently found to be erroneous. In that regard, Martz implies that the incorrect additions and improperly recorded figures indicate that there may have been a degree of impropriety in the selection process. In any event, Martz asserts, the Corps can use the amount allocated for contingencies to supplement the funds available for contract costs in order to make award to Martz for the base bid (including Additive 1) and Additives 2, 3, and 4. (On that basis, Martz' bid at \$371,126 is low compared to Mechaneer's at \$377,000.) We find no legal merit to the protest.

A basic purpose of the "Additive Deductive Items" clause requirement that bids be evaluated based on the funds available at bid opening is to insure that after bids are exposed the contracting agency cannot manipulate the amount of funds available to select enough additives to insure award to a particular firm. See H. M. Byars Construction Company, 54 Comp. Gen. 320 (1974), 74-2 CPD 233. Here, the Corps has stated that the errors made in recording the funds available for this contract simply were inadvertent, and our examination

of the Corps' pre-bid opening documentation supports the agency's position, in that it shows that while there indeed was approximately \$400,000 available for this project in its entirety only \$357,149 was available for the contract itself. DA Form 2544 was prepared nearly 3 weeks before bids were opened. It established that the funds committed for the contract included \$170,930 for one building, \$171,434 for the other, and \$14,785 other items: the total of these figures is \$357,149. Listed as "additional approval amount" is a total of \$46,432 for contingencies and S&A, as required by Army Regulation 415-35 ¶ 1-2 (respectively, 5 and 8 percent of the contract funds). Since contingency and S&A funds are not available to meet a contract price, DA Form 2544 established well before bid opening, regardless of Martz' implication to the contrary, that \$357,149, not \$400,000, was available for the contract.

Thus, the record shows that the Corps merely erred, as it says, in recording on DA Form 2496 the amount of money it could spend for this contract, not that the agency manipulated funding after bids were exposed to favor a particular bidder. The government cannot be bound, as Martz seemingly urges, to enter into a contract at a price more than the funds actually available in order to satisfy an erroneous written determination of available funds expressed in DA Form 2496. In this circumstance, the Corps properly made an award to Mechaneer for the base bid (including Additive 1) and Additives 2 and 3 because the firm's bid on that basis was nearly \$10,000 lower than Martz' and, at \$353,752 did not exceed the amount of contract funds actually available.

Martz also urges that even if no impropriety exists, it may still receive award for the base bid (including Additive 1) and Additives 2, 3, and 4 because the Corps can use the money allocated for contingencies (\$19,859) to supplement the contract funding, and Martz is low on that basis. As the Corps points out, however, its regulations preclude the use of contingency funds to meet a contract price. In any event,

B-213320

Martz' suggested approach would result in precisely the situation that the "Additive or Deductive Items" clause is designed to preclude: post-bid opening addition of fund to the amount established as available simply to direct the contract away from one firm and toward another.

The protest is denied.

Harry R. Van Cleave
for Comptroller General
of the United States